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No. 90-1552

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief as amicus curiae in this case. The consent of the attorneys for petitioners has been obtained, but the attorneys for respondent have refused to consent.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in inter-

pretations of the antitrust laws that adversely affect competition.

This case involves the appropriate standards for summary judgment in antitrust cases. The issues raised are of particular importance to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether their strategies may prompt suits by competitors or customers, and thus result in excessive litigation costs. A critical issue is whether unmeritorious suits, if filed, can be resolved on summary judgment without trial.

The attached brief focuses on two of the errors in the opinion of the United States Court of Appeals for the Ninth Circuit: (1) the determination that ambiguous evidence may defeat a summary judgment motion, which permits juries to reach verdicts on the basis of pure speculation; and (2) the requirement that businesses show "significant procompetitive conduct" in order to obtain summary judgment, which has no basis in any statute or rule, and establishes courts as mini-regulators. This amicus brief does not just restate the arguments in the Petition for Writ of Certiorari or focus on the specific facts of this case. Rather, the brief discusses aspects of the issues which are not addressed in the Petition and which have far-reaching practical consequences for all business organizations.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

Respectfully submitted,

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services, and believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in interpretations of the law that adversely affect competition.

This case presents the issue of when summary judgment must be granted in an antitrust case. The opinion of the United States Court of Appeals for the Ninth Circuit replaces the summary judgment standards articulated by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), with new standards that permit plaintiffs to go to trial on the basis of purely ambiguous evidence unless the defendant can prove that such a trial would deter "significant pro-competitive conduct." This ruling is of particular concern to large business organizations like those represented in The Business Roundtable. When they make decisions on competitive strategies, businesses must consider whether those strategies may prompt litigation and what the costs of litigation might be.

The Roundtable subscribes to the criticisms of the opinion below that are contained in the Petition for Writ of Certiorari. This amicus brief will discuss the deficiencies in the opinion from a somewhat different perspective, and will emphasize the broad adverse consequences of the standards invented by the Ninth Circuit panel.

First, the panel's opinion stated that *Matsushita* cannot really mean what it says. The court said that if "a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible . . . that decision would lead to a dramatic judicial encroachment on the province of the jury."[1] The court below apparently believed that it had to rescue this Court from the consequences of an inadvertent error in *Matsushita*.

The lower court is wrong. The precise language of *Matsushita* is consistent with traditional Supreme Court authority. The principle that a plaintiff cannot proceed

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[1] Appendix A to Petition for Writ of Certiorari at 8a-9a (hereinafter "App. A").

to trial on the basis of evidence that gives equal support to two conflicting inferences was clearly expressed in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933); it was applied in the antitrust context in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968); and it was definitively explained in *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita*.

This first mistake in the opinion below is directly responsible for another serious mistake. Because the Ninth Circuit panel was mistakenly concerned about what appeared to be an intrusion on the jury's function if *Matsushita* were read literally, it read *Matsushita* to require a further balancing test before summary judgment may be granted: namely, whether "an inference of antitrust conspiracy from circumstantial evidence . . . would have the effect of deterring significant procompetitive conduct."[2] This summary-judgment test is wrong, not only because it nowhere appears in *Matsushita*, but also because it actually creates an entirely new rule of substantive antitrust law. Under the antitrust laws, conduct either is or is not an unreasonable restraint of trade. The court below suggests in effect that there is a third category of conduct, which is not an unreasonable restraint but nonetheless is also not sufficiently procompetitive for courts to be concerned about the chilling effect of jury speculations. There are no standards in the statute or in decided law to circumscribe this putative third category.

The decision below would require a trial court *at the summary judgment stage* to engage in a full-blown and unbounded inquiry into whether certain practices are or are not "procompetitive." This is an extraordinary requirement to be embodied in a decision that purports to be concerned about too much judicial fact-finding! If

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[2] *Id.* at 11a.

allowed to stand, the decision will, of course, also undercut everything that *Matsushita* tried to accomplish. Under *Matsushita*, judges have a critical responsibility to screen out meritless litigation. The Ninth Circuit's opinion would undermine the court's responsibility to determine whether a reasonable juror could find for the plaintiff, not only on motions for summary judgment but also on motions for directed verdict or judgment j.n.o.v.

For these reasons, the decision below could have consequences that extend far beyond the specific case in issue and adversely affect the administration of justice.

I. THE DECISION BELOW WOULD PERMIT A JURY TO FIND A CONSPIRACY ON THE BASIS OF AMBIGUOUS EVIDENCE THAT IS EQUALLY CONSISTENT WITH COMPETITION.

In *Matsushita*, this Court addressed the types of evidence sufficient to establish a "genuine issue of material fact" that would require trial and thus enable a nonmovant to avoid entry of summary judgment.[3] In particular, the Court focused on whether inferences from ambiguous circumstantial evidence could establish a "genuine" issue of fact. The Court found that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 antitrust case," 475 U.S. at 588, and reiterated its prior holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*, *citing Monsanto Co. v. Spray-*

[3] In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court decided that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, once a movant has established the absence of a genuine issue of material fact, the burden shifts to the non-movant to demonstrate the existence of such a fact.

Rite Service Corp., 465 U.S. 752, 764 (1984). The Court specifically held:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." [475 U.S. at 588.]

The opinion of the Ninth Circuit panel states that this Court's *Matsushita* opinion does not mean what it says: "We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible."[4] The principal reason given for the refusal to apply the language of *Matsushita* is that the language, taken literally, "would lead to a dramatic judicial encroachment on the province of the jury."[5] To avoid this apparent difficulty, the opinion constructed an entirely new summary judgment standard:

> In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior.[6]

Under this novel standard, the burden is no longer on plaintiffs to produce evidence that "tends to exclude" the possibility of independent action, but rather is on

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[4] App. A at 8a-9a.

[5] *Id.* at 9a.

[6] *Id.* at 13a-14a. We assume that the phrase "beneficial procompetitive behavior" means the same thing as "significant procompetitive conduct," which appears earlier in the opinion, *id.* at 11a.

defendants to show that the challenged conduct is "pro-competitive."[7] This is a serious distortion of the *Matsushita* decision.

Matsushita reaffirmed *Monsanto*'s holding that it is not "reasonable" to draw an inference of conspiracy where evidence is equally consistent with competition and conspiracy. Where the evidence is equally consistent with either ultimate fact—competition or conspiracy—a jury would have no basis on which to decide which inference was more likely than not. To permit a conspiracy inference in those circumstances would basically permit a jury to reach a verdict based on the collective guesses of its members. It would essentially be the same as permitting a jury to reach a verdict on the basis of no evidence at all.

The classic articulation of this problem appears in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333 (1933), an accident case in which the evidence equally supported two inconsistent explanations for the accident. This Court held:

> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover. [288 U.S. at 339.][8]

Before the decisions in *Matsushita*, *Celotex*, and *Liberty Lobby*, there was much discussion among courts and com-

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[7] The Ninth Circuit is alone among the Courts of Appeals in its burden-shifting requirements. *See generally* DeSanti & Kovacic, Matsushita: *Its Construction and Application by the Lower Courts*, 59 Antitrust L.J. 609, 626-628 (1991) and cases cited therein.

[8] This case arose in the context of a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), has clarified that the same analysis applies to both directed verdict and summary judgment issues.

mentators about the continued viability of this articulation.[9] A significant cause of the confusion was a series of cases under the Federal Employers' Liability Act and the Jones Act in which this Court seemingly renounced (without overruling) the *Pennsylvania Railroad* standard and adopted the view that the jury must resolve all competing inferences.[10]

Whatever the merits of these cases, it is clear that *Matsushita* applied the *Pennsylvania Railroad* standard for antitrust cases (even though the case was not cited).[11]

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[9] In 1951, Professor James reported the "usual" test to determine a "legitimate" inference as: "where from the facts most favorable to the plaintiff the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture and a jury will not be permitted to draw it." James, *Proof of the Breach in Negligence Cases (including Res Ipsa Loquitur)*, 37 Va. L. Rev. 179, 185-186 (1951). Professors Wright and Miller subsequently reported that, although courts articulated this test, "it may be that the purported test overstates the quantum of proof required," and that courts recognized "that if the evidence might reasonably lead to either of two inferences it is for the jury to choose between them." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2528 (1971) (footnote omitted). Professor Cooper similarly concluded that federal courts had shifted away from the "more useful approach" of *Pennsylvania Railroad* in favor of the view that juries should select among competing inferences. Cooper, *Directions for Directed Verdicts: A Compass for the Federal Courts*, 55 Minn. L. Rev. 903, 957 (1971).

[10] *See* 9 C. Wright & A. Miller, Federal Practice & Procedure § 2526. This Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962), an antitrust case, also has been read to support such a view.

[11] Similarly, in *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968), this Court held that a refusal to deal that was equally consistent with independent action as with conspiracy was insufficient evidence to require trial. *Id.* at 280, 286-290. In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), the Court also found that conduct equally consistent with competition and conspiracy would not require trial; rather, evidence that "tends to exclude" the possibility of independent action is required.

Under this standard, there is a subtle distinction between situations where juries should be permitted to choose between competing inferences and situations where they should not. The question is whether the evidence provides a basis on which a jury could make a rational choice between inferences. As explained by one commentator, Dean Friedenthal: "It is only when a trier of fact could reasonably choose between inferences that summary judgment should be denied. In some situations it is clear without question that no rational choice is possible." [12]

Dean Friedenthal posits two examples to explain the difference between circumstances in which the evidence is sufficient for a jury determination and those in which it is not. In one example, there are separate pieces of undisputed evidence that each give rise to different and inconsistent inferences.[13] In these circumstances, *each piece of evidence* "tends to exclude" the possibility of a contrary inference. The inferences are therefore competing, and the jury should be permitted to decide which inference is more probable than not. In the other example, *the only evidence* that exists is such that it is impossible to determine which inference is "more likely than not." [14] In these circumstances, "[o]ne could argue

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[12] J. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standard?*, 63 Notre Dame L. Rev. 770, 785 (1988).

[13] The example involves a person who must take one pill per day to remain alive, but will die if two pills per day are taken. The person is found dead with clear evidence that two pills have been taken. The issue is whether this was an accident, implying substantial insurance recovery, or suicide, implying much less insurance recovery. One item of undisputed evidence is that the person substantially revised his will just hours before death; another is that, around the same time, he made plans with friends for a trip the next day. *Id.* at 786.

[14] That example involves a two-car accident in which the evidence is clear that one of the drivers went through a red light, but the absence of eye witnesses or survivors makes it impossible to determine which driver was at fault. *Id.* at 785.

that this is not a case of competing inferences at all; it is really a situation in which there can be no inference." [15]

Many Courts of Appeals other than the Ninth Circuit have implicitly recognized this distinction and have decided cases accordingly. Thus, where each individual piece of evidence could give rise to an inference of either conspiracy or independent action, courts have generally upheld summary judgment and refused to permit juries to speculate.[16] Evidence of "parallel pricing," for example, is equally consistent with perfect competition or perfect collusion, and courts do not permit an inference of conspiracy if this is all there is. The opinion in *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) (Kennedy, J.), provides another instructive illustration. Summary judgment was sustained when the same piece of evidence could give rise to three different inferences, but the jury would have no basis on which to choose among those inferences other than by speculation. 810 F.2d at 903-904.

By contrast, where separate pieces of evidence each give rise to one reasonable inference and the inferences to be drawn are inconsistent, courts typically have permitted juries to resolve the issue. In these cases, juries are implicitly selecting the pieces of *evidence* that are most significant, which is what juries do all the time.[17] They are not, however, engaging in pure speculation about competing inferences that are equally probable.[18]

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[15] *Id.* at 785.

[16] DeSanti & Kovacic, *supra* note 7, at 619-626 and cases cited therein.

[17] When juries do this, of course, they are deciding cases on the basis of circumstantial evidence. The opinion below is wrong when it suggests that a literal reading of *Matsushita* would require plaintiffs to prove conspiracies by direct evidence. *See* App. A at 10a.

[18] *See, e.g., Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988); DeSanti & Kovacic, *supra* note 7,

The *Matsushita* standards therefore do not encourage courts to invade the jury's function; they rather provide guidance for the performance of a function that must be performed by the court: namely, the assessment of whether a "genuine issue of material fact" exists for trial, which means "whether an inference adverse to the moving party is sufficiently plausible that it could reasonably be drawn by a jury." [19] Thus, the Ninth Circuit panel erred when it rejected the plain language of *Matsushita* on the ground that it impermissibly interfered with matters appropriately left to the jury.

Certiorari is appropriate here to clarify the reasons why the *Matsushita* standards for summary judgment do not invade the jury's function, not only to correct the erroneous decision below, but also to avoid further distortions of the *Matsushita* opinion by other courts that similarly do not understand it.

II. THE DECISION BELOW IMPOSES AN UNPRECEDENTED SUMMARY JUDGMENT STANDARD WITH NO LEGAL CONTENT.

The opinion below requires antitrust defendants seeking summary judgment to demonstrate that "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." [20] Neither the Sherman Act nor Federal Rule of Civil Procedure 56 nor prior case law provides any authority for this requirement. In addition, the requirement has no legal

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at 627-628, 633-634 ("Ninth Circuit panel has strayed even farther from the *Matsushita* and *Celotex* standard. * * * This Ninth Circuit reading of *Matsushita* conflicts with other circuits' opinions applying *Matsushita*.").

[19] Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487 (1984). Judge Schwarzer proposes several considerations for courts to assess in making this determination. *Id.* at 487-488.

[20] App. A at 13a.

content because section 1 of the Sherman Act does not distinguish between independent conduct that is "procompetitive" and any other form of independent business behavior.

The opinion below explicitly acknowledges that this new requirement would compel a court to "consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement." [21] This means, that *before they could decide a summary judgment motion*, courts would be forced to conduct a regulatory kind of proceeding and decide what legal conduct is sufficiently worthy to be protected against the chilling effect of speculative jury verdicts. It is simply incredible that the Ninth Circuit panel, ostensibly concerned about judicial fact-finding, would invent such a fact-bound summary judgment test.

A. The Ninth Circuit's New Requirement Has No Legal Foundation.

Section 1 of the Sherman Act prohibits concerted action in "restraint of trade." Since all agreements restrain trade to some degree, the courts have added the gloss that a challenged restraint must be "unreasonable" to be illegal.[22] The statute therefore authorizes courts and juries to determine: (1) whether business conduct is concerted or independent, and (2) if concerted, whether it is reasonable or unreasonable. It does not create a third category of conduct that is independent and reasonable but competitively unimportant. In particular, the statute does not suggest that courts should take more care to protect "significantly procompetitive conduct" against mistaken inferences of illegality than they take to protect other kinds of lawful conduct.

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[21] *Id.* at 11a.

[22] *E.g., Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

Nor does case law under the Sherman Act support such a suggestion. *Matsushita*, on which the Ninth Circuit panel purports to rely for the origin of its new requirement, repeats the *Monsanto* caution that "courts should not permit factfinders to infer conspiracies when such inferences are *implausible*, because the effect of such practices is *often* to deter procompetitive conduct." 475 U.S. at 593, *citing Monsanto*, 465 U.S. at 762-764; emphasis added. This caution, like the rule limiting permissible inferences based on ambiguous evidence, implements the policy against jury verdicts based on unreasonable inferences. The Court did not say, however, that juries *could* rely on implausible inferences if specially procompetitive conduct were not at issue.

Indeed, the lone authority supporting the Ninth Circuit opinion's new requirement appears to be a Stanford Law Review note that describes *Matsushita* as "ambiguous" and possibly "dangerously overbroad."[23] The Note argues that the permissibility of an inference from circumstantial evidence should be evaluated on the basis of whether the inference would have an undesired deterrent effect. "In such a situation, the judge must decide whether the innocent behavior that will be deterred is important enough that further proof will be required in order to avoid this undesired effect."[24] The Note asserts that "[t]his determination will be guided by the governing substantive law."[25] But, neither antitrust law nor the Federal Rules of Civil Procedure specify how courts should assess whether business conduct is sufficiently procompetitive to qualify for the application of summary judgment standards under Rule 56.

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[23] Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stan. L. Rev. 491, 492, 507-512 (1988).

[24] *Id.* at 511.

[25] *Id.* at 511; footnote omitted.

B. Summary Judgment Rules Should Apply Equally to All Claims of Conspiracy Based on Ambiguous Evidence.

Matsushita's expressed concern about the chilling effects of mistaken conspiracy inferences on procompetitive conduct does not establish the opposite proposition that there should be no concern about the effects of mistaken inferences on competitively neutral conduct. Yet this is precisely the position taken by the Ninth Circuit panel: if significantly procompetitive behavior (determined by some unspecified standard) is not involved, then an antitrust plaintiff may avoid summary judgment and go to trial simply on the basis of ambiguous circumstantial evidence.

Apart from the complete absence of any authority for such a test, there are other practical problems with it. Courts (or juries) can never know with certainty all of the competitive effects of any business practice. As Judge Easterbrook has explained:

> In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no 'right' balance between cooperation and competition. The judge has no benchmark. Small wonder that the history of antitrust is filled with decisions that now seem blunders.
>
> • • • •
>
> Antitrust is costly. The judges act with imperfect information about the effects of the practices at stake. The costs of action and information are the limits of antitrust.[26]

Given these limitations, it makes no sense to build such fact-driven and uncertain determinations into a summary judgment standard. A defendant, in effect, would

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[26] F. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3, 4 (1984).

have to prevail in a regulatory proceeding in order to establish the right to a summary disposition.

Another antitrust scholar makes a similar point. Robert Bork has argued that "in all cases in which behavior is neutral or in which analysis does not provide a basis for predicting effects upon consumer welfare, tie-breaking considerations indicate that the law should not intervene." [27] Professor Bork bases this judgment in part on the insight that courts are not likely to be able to identify conduct that truly is competitively neutral: "If the deadweight loss [of consumer welfare] and efficiency are not in fact equally balanced, then the conduct is either beneficial or detrimental[,]" and not something in between.[28] If even theoretically there is no place for the third category of conduct that the Ninth Circuit has created, courts and litigants should not be put to extraordinary burdens in order to find it.

The Ninth Circuit's opinion treats Rule 56 as inapplicable to any antitrust defendant whose conduct is not viewed as "significantly procompetitive" by the court. In *Celotex*, however, this Court admonished that "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." 477 U.S. at 327.

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[27] BORK, THE ANTITRUST PARADOX 117, 133 (1978). If the law should not intervene to prohibit conduct, it also should not inhibit conduct by a refusal to apply ordinary summary judgment standards.

[28] *Id.* at 133.

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CONCLUSION

This Court's opinion in *Matsushita* was well grounded in precedent and did not sanction an invasion of jury prerogatives. A piece of evidence from which two equally plausible inferences may be drawn cannot support a jury verdict for the party with the burden of proof. It is no better than no evidence at all.

Matsushita does not need to be rescued by the Ninth Circuit, which reads things into the Court's opinion that are not there in order to avoid imaginary difficulties. Moreover, the additional requirements that the Ninth Circuit would impose on defendants seeking summary judgment have no legal content. A requirement that courts evaluate the degree to which conduct is competitively useful in the context of a summary judgment motion would add yet another layer of unbounded scrutiny to the already difficult task of applying the Sherman Act.

The Business Roundtable, as *amicus curiae*, asks the Court to accept this case for review in order to reverse the opinion below.

Respectfully submitted,

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